UNITED STATES
v.
JOHN M. TAPPAN, JR., ET. AL.

IBLA 75-288 Decided May 5, 1976

Appeal from decision by Administrative Law Judge Harvey C. Sweitzer declaring mining claims in Utah Contest 10703 null and void.

Affirmed.

1. Administrative Procedure: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity

When a government mineral examiner testifies that he has examined the exposed workings on a claim without finding sufficient mineral values to support the discovery of a valuable mineral deposit, a prima facie case of lack of discovery has been made.

2. Mining Claims: Discovery

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

3. Mining Claims: Discovery--State Laws

State mining laws relating to discovery may only add to the federal mining law; such laws cannot diminish the federal requirements for the discovery of a valuable mineral deposit on a mining claim located on federal lands.

APPEARANCES: Duane A. Frandsen, Esq., Frandsen and Keller, Price, Utah, for appellants. John McMunn, Esq., Office of the Solicitor, U.S. Department of the Interior, San Francisco, California, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

Appellants 1/ have appealed from a decision of Administrative Law Judge Harvey C. Sweitzer dated November 26, 1974, declaring certain lode mining claims 2/ held by appellants to be null and void for lack of a discovery of a valuable mineral deposit. The claims were all located for uranium and copper in the years 1954 through 1957. All of the contested claims are within the boundaries of the Capitol Reef National Park. The Capitol Reef National Park was created by the Act of December 18, 1971, 85 Stat. 739, which abolished the Capitol Reef National Monument. The Act merely changed the designation of the area from National Monument to National Park. There was no extension or contraction of the physical boundaries of the area. In fact, the area encompassing the claims herein was first withdrawn from the operation of the mining laws as part of the Capitol Reef National Monument by Presidential Proclamation 3888, "Enlarging the Capitol Reef National Monument, Utah," dated January 20, 1969.

The contest herein was initiated by the Bureau of Land Management at the request of the National Park Service. The complaint charged that the land embraced by each claim was non-mineral in character and that sufficient minerals had not been found within the limits of each claim to constitute a discovery at the date of withdrawal of the land, or to presently support a discovery on each claim within the meaning of the mining laws.

Judge Sweitzer found all of the contested claims null and void for lack of a discovery of a valuable mineral deposit as of January 20, 1969, the date of the withdrawal, and as of the hearing date. 3/

1/ Appellants herein are those contestees listed in the contest complaint: John M. Tappan, Jr., aka John Milton Tappan, Jr., aka J. M. Tappan, Jr., Mrs. Evangeline Tappan, J. M. Tappan, R. Jack Jensen and Brent Lee.

2/ The following are the 69 lode claims listed in the contest complaint: Big Wonder; Little Wonder; Little Wonder; Little Wonder; Little Wonder No. 2; Rocket; Rocket; Cottonwood No. 1; Cottonwood No. 2; A-1 No. 1 through A-1 No. 11; Yellowpine; June Freeze; Jack No. 1 through Jack No. 4; Jacks No. 5 through Jacks No. 8; Jack No. 9; Jack No. 10; Big Jacks No. 1 through No. 9; Big Jacks No. 17; Big Jacks No. 20; Big Jacks No. 24; Big Jacks No. 28; Big Jacks No. 32; Big Jacks No. 35 through Big Jacks No. 37; Big Jacks No. 39; Big Jacks No. 40; Big Jacks No. 42 through Big Jacks No. 59. All the claims are located in Garfield County, Utah.

3/ Whether a discovery existed at the time of the hearing is only important if there was a discovery at the time of withdrawal. If no discovery existed when the land was withdrawn from mining location, the claim is null and void regardless of a later discovery.

We have reviewed Judge Sweitzer's summation of the evidence, his evaluation and findings, and his conclusion. He has given a complete summation of the pertinent evidence, with which the parties have expressed agreement. We agree with his findings and conclusion, and, therefore, we adopt his decision as the decision of this Board and attach a copy hereto.

Appellants have raised certain points on appeal that, while not affecting the outcome of the case, deserve a brief discussion. They have charged that the Government failed to sustain its burden that there was no discovery of a valuable mineral deposit on the claims herein. In support of this charge appellants cite the fact that a 72 foot adit had been driven on one of the claims and that various people were willing to expend money in further development of the claims. Appellants also question the testimony of Robert O'Brien, the Park Service mining engineer who investigated the claims.

[1] An examination of O'Brien's testimony and the Government's exhibits makes it clear that the Government sustained its burden of establishing a prima facie case of the invalidity of all the claims herein. While we agree with appellants that a certain amount of work had been done on one of the claims, that people had expended money in the development of such claim, and that they might be willing to expend more money, the evidence presented by appellants falls far short of meeting their burden to show by a preponderance of the evidence that there was a discovery of a valuable mineral deposit on each of the claims. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Rigg, 16 IBLA 385 (1974).

Appellants also contend that Judge Sweitzer erred in holding that there was no discovery of a valuable mineral deposit on the claims as of the date of withdrawal of the lands and as of the date of the hearing. In support of this contention they cite the testimony of three of their witnesses and point to the Utah case of Rummell v. Bailey, 7 Utah 2d 137, 320 P.2d 653 (1958), as establishing the law of discovery on uranium claims in Utah.

[2] The witnesses' testimony cited by appellants is not supportive of their assertions when considered in light of other testimony given by the same witnesses. Raymond J. Lyman testified, "I think the property justifies more exploration." (Tr. 274.) Evidence of mineralization which might warrant further exploration work within a claim, rather than development of a valuable

mine, is not sufficient to constitute discovery of a valuable mineral deposit. United States v. Swanson, 14 IBLA 158, 81 I.D. 14 (1974); United States v. Gondolfo, 9 IBLA 204 (1973).

Donald D. Hanni stated that based on what he had heard others testify to at the hearing he thought the claims were a good prospect and should be investigated (Tr. 303), but he had never personally been on the claims (Tr. 287). Dennis Ekker, while he had been hunting in the canyon where the claims were located, was unfamiliar with the mineralization on the claims (Tr. 310, 323).

[3] Rummell, relied upon by appellants, is not controlling herein. State mining laws may only add to the federal mining laws relating to discovery; they cannot diminish the federal requirements for the discovery of a valuable mineral deposit on a mining claim located on federal lands. See 30 U.S.C. § 26 (1970); Belk v. Meagher, 104 U.S. 279, 286 (1881).

Appellants' assertion that under the rule announced in Rummell a discovery on the Big Wonder claim would apply to all other claims located on the channel and to all claims located on the visible outcrop and the contact between the Shinarump and Moenkopi formations is not in accord with the federal law on discovery. Even assuming a discovery on the Big Wonder claim, a discovery on one claim does not validate a group of claims; a mining claimant must show a discovery of a valuable mineral deposit within the limits of each claim. See 30 U.S.C. § 23 (1970); United States v. Zweifel, 16 IBLA 74 (1974).

Appellants have failed to comply with the federal requirements for the discovery of a valuable mineral deposit on any of the claims herein as of the date of withdrawal of the lands embracing the claim and as of the date of the hearing. Therefore, the contested claims are null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Newton Frishberg
Chief Administrative Judge

We concur:

Fredrick Fishman
Administrative Judge

Martin Ritvo
Administrative Judge

IBLA 75-288

November 26, 1974

DECISION

UNITED STATES OF AMERICA, CONTESTANT V. JOHN M. TAPPAN, JR. AKA JOHN MILTON TAPPAN, JR., EVANGELINE TAPPAN, TAPPAN, JENSEN, BRENT LEE TAPPAN, CONTESTEES	: UTAH 10703 : Involving the: Big Wonder; Little Wonder; Little Wonder; Little Wonder No. 2; Little Wonder No. 9; Big Rocket; Cottonwood No. 1; Cottonwood No. 2; A-1 No. 1 AKA A-1 No. 10; Big Jacks No. 1 through No. 20; Big Jacks No. 17; Big Jacks No. 24; Big Jacks No. 28; Big Jacks No. 32; Big Jacks No. 35 through Big Jacks No. 37; Big Jacks No. 39; Big Jacks No. 40; Big Jacks No. 42 through Big Jacks No. 59 lode mining claims located in Garfield County, Utah.	

Pursuant to 43 CFR Part 4, and at the instance of the National Park Service, Department of the Interior, the Utah State Office, Bureau of Land Management, Department of the Interior, issued a complaint on May 17, 1973, challenging the validity

of the captioned mining claims, located in southern Utah. The complaint in its paragraph 5 alleges that each of said mining claims is invalid because:

a. The land embraced in each claim is non-mineral in character.

b. Sufficient minerals have not been found within each claim to constitute a valid discovery on said claim within the meaning of the mining laws.

c. Sufficient minerals have not been found within the limits of each claim to constitute a valid discovery on said claim at the date of withdrawal of the land for the Capitol Reef National Park.

d. Sufficient minerals have not been found within the limits of each claim to presently support a valid discovery within the mining laws on said claim.

Contestees filed a timely answer denying the allegations in paragraph 5 of the complaint and alleging that each of the mining claims is "mineral in character and that sufficient minerals have been found within each claim to constitute a valid discovery on said claim within the meaning of the mining laws and that each of said claims was good and valid prior to the withdrawal of the public lands for the Capitol Reef National Monument."

Pursuant to due notice, a hearing was held in Salt Lake City, Utah, on January 31, 1974. This resulted in an official transcript of the proceedings consisting of 341 pages which is considered amended, in part, as specified in order issued November 18, 1974. Contestant was represented by Mr. John McMunn of the Office of the Field Solicitor, U. S. Department of the Interior, San Francisco, California. Contestees were represented by Mr. Duane A. Frandsen, Attorney at Law, Price, Utah.

Summation of Evidence

Mrs. Evangeline Tappan, one of the contestees, was called as an adverse witness by contestant. She stated that she presently

owns a substantial interest in the mining claims but that there are several other parties owning fractional interests. 1/ She gave her opinion that uranium and copper are present on her claims and said that these minerals have been removed or mined from certain of the claims although none have been shipped. She specified the Big Wonder and the Little Wonder as two claims which have been mined, although she admitted there have been no sales of such materials. She indicated that since about 1972 no mining has been done because of compliance with request from the National Park Service that the land not be further disturbed.

Mr. Robert O'Brien testified that he is employed as a mining engineer by the National Park Service; that he is a registered professional engineer; that prior to his employment of some two years with the National Park Service he had rather extensive experience with other mining companies, including work with copper and uranium. He alluded to seven different examinations of the contested claims between March 1972 and August 1973 and said he was also on the claims the day preceding the hearing.

He testified that during the course of the examination of his claims, he utilized a Geiger counter and walked the contact around the area between the Chinle and Moenkopi formations. He gave his opinion that in the area of the Capitol Reef National Park the most likely place for uranium to occur is in scours in the Shinarump which is the lower member of the Chinle formation. He said that prior to his use of the Geiger counter he calibrated it. He advised that the only readings above background level that he observed was on the Big Wonder claim. He said he saw no indications of copper on any of the claims.

Mr. O'Brien stated that the nearest market place for uranium in the proximity of the claims was Moab, Utah, some 158 miles distant. He said that he observed no work having been done on any of the mining claims except for an adit on the Big Wonder and road work on certain of the other claims. He testified to the taking of two chip samples from the adit on the Big Wonder claim. The two samples are shown in a report of analysis (Ex. 2) to contain uranium oxide in percentages of 0.0006 and

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1/ I make no finding respecting whether all appropriate contestees were duly served with complaint, the evidence of record being insufficient to form the basis of such a finding.

0.0004, respectively. His opinion was that these do not demonstrate significant percentages of uranium. Mr. O'Brien testified that he also took three channel samples from within the adit. These showed the following percentages of uranium oxide; 0.130, 0.080, and 0.089. (Ex. 3) He said that he considered that none of these represented significant percentages.

Mr. O'Brien opined that "the two sets of samples reported upon by the assayers is a fair indication of the mineralization of the Tappan group of mining claims." (Tr. 44)

With respect to the mining claims at issue, Mr. O'Brien gave his opinion that "I do not think there is a discovery on those claims, all of them, which would lead a prudent man to invest his time and money * * * or any one of them." (Tr. 54)

Exhibit 1 is a report prepared by Mr. O'Brien advising that he was unable to find a map of the mining claims. It states that on one of his examinations, on July 29, 1972, he met the nephew of Mrs. Evangeline Tappan

> . . . and he showed me where the Big Wonder claim and Little Wonder No. 1 claim were positioned.
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> From this meager data, a claim map of North Coleman Canyon was projected. This plat may or may not be the correct positioning. (Ex. 1, p. 2)

Beginning at page 3 of Exhibit 1 a designation is contained of the claims under contest. 2/

On cross-examination, Mr. O'Brien conceded that certain other mining properties in the general geographical area of the claims under contest and having geological similarities thereto, had produced uranium ore in previous years. He admitted he did not know the quantity of "ore" that might exist on any of the claims but stated his opinion was that the quality of any mineralization was not sufficient for economical mining even if

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2/ Minor discrepancies are noted between the spellings and designations in Exhibit u and in the complaint. However, these are deemed to be of a clerical nature. Particularly is this so in view of failure of contestees to specify otherwise.

large quantities of such low quality existed. He reiterated that his opinion was that even during the "uranium boom" of the early and mid-1950's, there were not sufficient showings on the claims to justify a prudent man to further expend his time and means. (Tr. 83) He admitted that the contestees had evidently been willing to spend moneys on road work, tunneling, and in other respects on the claims, but insisted that did not alter his opinion respecting whether a prudent person would be justified in expending further labor and means on any of the properties. He did not deny that contestees were "prudent people." He stated at Tr. 97 that the only location on the ground of which he was certain with respect to identity was the Big Wonder claim. However, he did establish fairly well the approximate locations on the ground of the other claims under contest.

Mr. Lostin Lee testified he is related to contestees and that he is familiar with the mining claims under contest. He stated he first examined the claims on the ground in 1969. He testified to drillings he and others accomplished and to Geiger counter readings, however, no specific values or showings were related. He stated that following some work on the claims the Park Service "stopped our work." (Tr. 103) Specifically, that the Park Service precluded them from blasting with explosives. He did refer to "high" Geiger counter readings and to assyas that "went above one percent." (Tr. 108) He also testified to the existence of rather extensive favorable formations for the existence of uranium on the claims. He referred to analyses of samples from the claims, specifically Exhibits B through F, some of which showed readings in excess of 0.1 percent of uranium oxide. One particular sample (on Ex. C) showed 12 percent. He conceded, however, that he did not take the "12 percent sample" nor was he personally aware of the point from which this sample was taken nor the manner in which it was taken. He stated he could tell the areas where Mr. O'Brien had taken his samples and offered the opinion that, in general, such sampling was "out of the ore bodies, the majority of it, the top of it was in the over burden." (Tr. 119) Mr. Lee testified at some length concerning "exploratory work" in which he and others engaged. (e.g., Tr. 104 et seq.)

Mr. Brent Lee stated he is related to contestees and said he is familiar with the claims of concern, having been first on them in August of 1969. He testified at some length about "exploratory work" that he did. (Tr. 141 et seq.) He took certain of the samples identified on contestees reports of analyses (e.g., Ex. B), and also with respect to the use of the Geiger counter. It was on the basis of the Geiger counter readings, he said, that the samples which were assayed were

taken. The samples he took were all from the Big Wonder claim. He assisted with road building in the area. He talked about trying to locate the material which assayed at 12 percent (Ex. C), but stated the "12 percent ore" was some they found in a coffee can on the claim and he indicated they were not able to find further material of such a high reading. (Tr. 149) He opined that the cost for the amount of work that he and other persons had done on the claims in 1969 was of a value of around eight to ten thousand dollars. (Tr. 150)

Dr. DeForrest Smousc testified that he has a Ph.D. in geology and is a consulting geologist with the State of Utah, Department of Geological and Mineralogical Sciences. He is making an analysis of uranium ore reserves in the State of Utah. He testified to membership in the American Association of Petroleum Geologists and referred to other professional organizations of which he is or had been a member. He explained that his work included field work consisting of geologic observations and projections of quantities of ore reserves. He also stated that he checked on trends of the market in respect to determining the marketability of ore in the future. He has not been on the claims in question but has been on other mining properties in the general geographical area and stated that "Almost all of the uranium that is present in [the general area] . . . comes from what we call the Shinarump conglomerate or the Shinarump formations [which is actually] . . . a member of the Chinle." (Tr. 164) He also testified as to certain other members of the Chinle which show "uranium potential."

Based on the testimony of the other witnesses and on the exhibits in the case, Dr. Smousc stated that

> I would certainly go on to them and do some more sampling, which, of course, is an expenditure of time and money. Now, this doesn't mean I would go on and mine, but I might where my results from what I found on the claims were sufficient to lead me to believe that there was a potential of an ore body on there, which was of economic value.
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> * * *
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> With what I see here and also the samples on what Mr. O'Brien checked, I would definitely go ahead and feel if they were my own property, that I could go ahead and expend some funds on them, yes. (Tr. 182-183)

Dr. Smousc gave the opinion that there appeared to be similarities in the general geological structure and formation of the claims under contest as compared to other claims which had produced uranium in the general geological area. He stated that the price of uranium had been generally going downward for about the past fifteen years but expressed optimism that it would rise in the future.

Robert Earl Blackett testified that he has a Bachelor of Science degree in geology, has completed most of the work for a Masters degree in geological engineering, and that he is employed as a consulting geologist. He spent several hours on the contested claims with Mr. Ray Lyman (who testified subsequently at the hearing) in January of 1974. He stated

> . . . they appeared to be very similar in character to most of the other uranium deposits in along the Colorado Plateau. The Shinarump member of the Chinle formation is scoured into the Moenkopi. Now, I don't know exactly how big a scour is; we didn't measure it, but this is present plus there is carbonaceous material present. I photographed it and we took some samples but unfortunately they are not ready for today, the analysis is not ready. (Tr. 189-190)

With respect to the tunnel or adit on the Big Wonder claim, he stated (Tr. 191) "There appeared to be mineralization in the tunnel" and (Tr. 192) "There appeared to be mineralization down low in the adit." With reference to certain photographs (Ex. H, etc.), Mr. Blackett demonstrated the contact between the Shinarump and the Moenkopi formations in the close proximity of the adit.

Mrs. Evangeline Tappan again testified. She referred to experiences she had in prospecting for uranium over the years; to knowledge she had acquired with respect to uranium and the prospecting for it; and to mining in general. With regard to the Big Wonder claim, she stated she had obtained favorable readings on her Geiger counter and observed the contact between the Shinarump and the Moenkopi and said they had received assay reports from samples showing twenty-six hundredths uranium, although she said the assay report showing that percentage had

been lost. She referred to "nucleometer" readings of fifty-four hundredths on the Big Wonder claim. She and her husband located the Big Wonder in 1954 and other mining claims under contest during 1954 through 1957. She related getting really good Geiger counter readings all over the Big Wonder and Little Wonder claims. She and her husband examined the claims on numerous occasions up until 1963 when her participation slowed because of a knee problem. However, she recounted having been on the claims several times since then. She said her husband also had physical problems and he has not actually done any prospecting or development work on the claim since 1963 by reason of these problems which impaired his mobility. She emphasized the existence of the Shinarump and the Chinle and of channeling and testified that channeling was a likely place to find a uranium deposit. Her sole purpose in locating the claims, she related, was for their "mineral content" and the possibility of mining uranium from them (Tr. 224), emphasizing she had no purpose in locating them other than the hopes of mining, i.e. not for other uses of the surface, etc. She also related how she encouraged the establishment of the Capitol Reef National Park. Mrs. Tappan referred to Exhibit J, which is an August 1, 1972 letter on behalf of the National Park Service to her and her husband requesting that no blasting or other activities be done "which destroy the natural, scenic features of the canyon," and advising that

> If you discontinue such activities within the park and an administrative contest is brought to determine the validity of these claims, then a completion of the required work and labor under the provisions of 30 U.S.C. 28 for the year ending September 1, 1972, only, will not be a ground of contest in such administrative proceedings. The land within the National Park is not open to mineral location, and the claims may not be relocated. In any contest brought by the United States against any or all of these claims under the Federal Mining Laws, the failure to have performed the required annual assessment work for years prior to the year ending September 1, 1972, may be asserted in such contest.

Mrs. Tappan reiterated that she respected the request of the National Park Service.

Mrs. Tappan testified that the reason she deeded interests in the claims to other persons was to obtain their assistance in

financing the further exploration and development of the claims. (Tr. 238) She stated that she considers herself and her husband to be prudent persons and indicated that "considering the cost of mining this ore that may be there," she thinks an "ordinary prudent person [sic] prospector and miner would be justified in further expenditure of labor and means on these claims." Also, she is presently willing to expend further moneys and time "towards further exploration and development of the claims." (Tr. 239-240)

John Milton Tappan, also known as Jack Tappan, is the husband of Evangeline Tappan. He related experiences he had over the years in mining at uranium mines. He referred to similarities in the formations on some of the contested claims with some of the mines that he had worked and said some of such mines had been very successful economically. He believed that the "12 percent" assay material that was referenced on Exhibit C was from material he had found on or near the Big Wonder claim. He gave the opinion, with respect to the contested groups of claims, that ". . . I think that there is ore there. Quite a large quantity" and indicated he felt it justifies further exploration and labor and the spending of money on it. (Tr. 249)

Raymond Johnson Lyman, also known as Ray Lyman, testified that up until about 1966 he engaged extensively in mining uranium and prospecting for uranium, and that he has also done a certain amount of prospecting and mining subsequent to 1966. He testified to mines that he had helped to work in the Shinarump and Morrison formations which mines he characterized as being successful. He described these "successful" mines, indicating geologic similarities between them and the claims under contest. He testified to a 1970 examination of the Big Wonder and adjacent claims and expressed that "There was some very good count on the geiger counter. There is a highly mineralized area above the contact of the Moenkopi and Shinarump." (Tr. 255) He worked for about 45 days in driving the tunnel on the Big Wonder and doing some road work. He said the tunnel was driven approximately 72 feet back and "the quality of the ore in this mineralized zone improve[d] as you went back." (Tr. 263) He identified Exhibits D, E and F as assay sheets representative of some of the samples they took as they drove the drift. (These exhibits show uranium oxide varying between 0.037 and 0.237 percent.) He identified the type of sampling as "grab sampling." By use of photographs (Exs. K, etc.) he demonstrated the exposure of Shinarump formation on the Big Wonder claim. He expressed the opinion that the cost of driving a tunnel such as was done in 1970

as being approximately $ 35 to $ 40 a foot as of that (Illegible word). With respect to the contested claims and particularly the Big Wonder, he opined that "the property justifies more exploration" (Tr. 274) and stated that if he owned the claims he would be willing to spend time and money and labor in doing so. He also indicated that in order to further prospect and explore the claims blasting would be necessary.

Donald D. Hanni testified to his occupation as being that of a mine owner and operator and that he has spent some 20 years in uranium mining and prospecting in southern Utah. He related studies he had made of the geology pertaining to uranium in the Shinarump formation existent in southeastern Utah. Concerning evidence he had heard at the hearing involving these claims, he expressed an opinion that they had geologic similarities to other properties he had developed into paying mines and utilized data (Ex. N) to explain his testimony with respect to shipping uranium ores to the uranium processing mill located at Moab, Utah. These refer to 1968 and 1969 shipments and show percentages of uranium (U[3]O[8]) of around 0.2 percent.

Mr. Hanni gave his opinion that, based on his knowledge of the general area of the claims and the testimony he heard at the hearing, he would be willing to put his money and means and time into the contested claims. (e.g., Tr. 303) He qualified it, however, by saying "of course, I wouldn't invest until I went and looked at it." (Tr. 307)

Mr. Dennis Ekker testified that he is a miner and mill operator and that he studied geology and chemistry in college. He has also had considerable experience in mining uranium ore. He stated he is familiar with the general geology of the contested claims although he has not been on them prospecting purposes, but only for deer hunting and other similar functions. He testified to an "upgrading plant" in which he has an interest. With this plant, located at Notom, Utah, which is 14 or 15 miles from the contested claims, he is licensed by the Atomic Energy Commission to take low-grade uranium ores and, by use of chemical solutions, "high-grade" them for shipping to a mill. He advised that he has conducted pilot plant operations on certain ores obtained at or near Notom and that they have very successfully upgraded the average of the material. He stated he has sampled ore given to him off the contested claims, which he understood to be from the adit on the Big Wonder claim, and that it is amenable to the process. Indeed, he stated he was really enthused with it. (Tr. 318-319) He stated he would be willing to enter into a purchase or lease agreement with the contested

claim owners for purposes of such processing. He gave the opinion that with the system he has, materials of eight to ten hundredths could be profitably processed. He expressed the opinion that he, as a prudent miner, would "definitely" spend more money and time on the contested claims. (Tr. 320-321)

Mr. Ekker stated that although his plant had been in construction for about two years at the time of the hearing, it was not yet in operation as of that time and indicated he anticipated its being operable some time in 1974. It is clear from his testimony that this plant was not built with the contested claims in mind but its construction actually had to do with other mining claims located on or around the plant. He conceded he did not know whether the "ore" provided him by Mr. Ray Lyman was typical of materials on the Big Wonder claim.

Evaluation and Findings

I take official notice of Proclamation 3888 "Enlarging the Capitol Reef National Monument, Utah" of January 20, 1969, (Title 3, Code of Federal Regulations, Chapter 1) whereby the President extended the boundaries of the Capitol Reef National Monument "subject to valid existing rights." By the Act of December 18, 1971, (85 Stat. 739) Congress abolished Capitol Reef National Monument and created in its place Capitol Reef National Park. Although the location of all the contested mining claims on the ground was never firmly established at the hearing, it was stipulated between the parties that all of the contested claims are within the boundaries of the Monument (Park) as extended by Proclamation 3888. (Tr. 333-339) This Proclamation served to withdraw the lands involved from the operation of the mining laws "subject to valid existing rights." 3/

3/ The complaint in the case refers only to Capitol Reef National Park, and to the cited Act of December 18, 1971 (Complaint's paragraph 4, and charge "(c)" of paragraph 5) and nowhere to Proclamation 3888. Notwithstanding, there is no suggestion that contestees were prejudiced or mislead by reason of this, and it

For a mining claim to be valid, there must be an actual physical finding of a valuable mineral deposit within the limits of the claim. United States v. C. F. Snyder, 72 I.D. 223 (1965), aff'd 405 F.2d 1179 (10th Cir., 1968). A valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of his time and money in the development of a mine and the extraction of the mineral. The mineral deposit that has been found must have a present value for mining purposes. Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman, 390 U.S. 599 (1968).

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify the actual working of the property does not constitute a valuable mineral deposit within the purview of the mining laws. Chrisman v. Miller, supra; Converse v. Udall, 399 F.2d 616 (9th Cir., 1968).

And for a claim to be valid, a discovery must be effective prior to the time the land is withdrawn from application of the mining laws. On the date of a withdrawal, the right to enter the land and prospect or explore for minerals terminates. United States v. Snyder, supra; United States v. Pulliam, 1 IBLA 143 (1970); United States v. Almgren, 17 IBLA 295 (1974).

Where the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case and

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fn. 3 (continued)
is therefore appropriate to disregard the somewhat inarticulate wording of the complaint. See United States v. Stewart, 1 IBLA 161 (1970), United States v. Pierce, 75 I.D. 270 (1968); cf. Harold Ladd Pierce, 3 IBLA 29 (1971). Moreover, the matter is moot in view of my findings hereinafter that all the claims were lacking in discovery at the time of hearing as well as the time of Proclamation 3888. And there is no evidence indicating discovery as of December 18, 1971, when the same was lacking as of January 20, 1969.

the burden then shifts to the mining claimant to show by a preponderance of the evidence that the claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir., 1959).

In elaboration of the Government's burden in this regard, United States v. James W. Woolsey, 13 IBLA 120 (1973) states:

> A prima facie case has been made where a government mineral examiner testifies that he has examined the exposed workings on a claim and has found no mineralization sufficient to support the finding of a discovery of a valuable mineral deposit. United States v. Gould, A-30990 (May 7, 1969). In no case will the government's mineral examiner be required to perform discovery work for the claimant, to explore beyond the claimant's exposed workings, or to rehabilitate discovery points for the claimant. [Citing United States v. Kelty, 11 IBLA 38 (1973) and other decisions.] (p. 123)

Woolsey also reiterates that:

> . . . [although] the existence of ore in commercial quantities need not be proved beyond a reasonable doubt . . . proof that further exploration may be justified is not proof of a discovery of a valuable mineral deposit. What is necessary is proof that a prudent man would be justified in beginning actual development of the property with a reasonable prospect of success in developing a paying mine . . . . (pp. 123-124)

In the case at hand, the testimony of Mr. O'Brien, when coupled with Exhibit 1 and other exhibits referenced in his testimony, makes a prima facie case of invalidity with respect to all the contested mining claims. 4/ This is

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4/ Although the elicited testimony of Mr. O'Brien leaves some question whether he made an examination of all the mining claims under contest such as to enable him to testify as to them all, reference to Exhibit 1 satisfies the question in this regard.

true both with respect to the time the land was effectively withdrawn by Proclamation 3888 and also as of the time of the hearing. In this connection, it is notable that even assuming, arguendo, there may have been a proper discovery at some time in the past, a mining claim cannot be considered valid unless the claim is presently supported by a sufficient discovery. The loss of a discovery, either through exhaustion of the minerals, changes in economic conditions or other circumstances, results in the loss of the location. Mulkern v. Hammitt, 326 F.2d 896 (9th Cir., 1964).

Contestees' evidence suggests geologic similarities between the contested claims, or certain of them, and other mines from which uranium has been extracted. But as stated in United States v. Larsen, 9 IBLA 247, 261 (1973), appeal pending, Larsen v. Morton, Civil No. 73-119-TUC-JAW, D. Ariz.:

> * * * geologic inference cannot be accepted as the equivalent of discovery. That is, in order to demonstrate the discovery of a valuable mineral deposit on a lode mining claim, there must be physical exposure within the limits of the [**33] claim of a lode or vein bearing mineral of such quality and in such quantity as to invite the expenditure of money and effort * * *. If there is not such an exposure, no showing, regardless of the strength of the evidence, of the likelihood of the existence of a valuable ore body will suffice to demonstrate a discovery. See, e.g., United States v. Henault Mining Company, 73 I.D. 184 (1966); aff'd in Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied 398 U.S. 950 (1970); United States v. Kenneth O. Watkins and Harold E. L. Barton, A-30659 (October 19, 1967).

Contestees' case, at best, would support the proposition that mineralization exists on the Big Wonder and conceivably on certain of the other claims such as to warrant further exploration, but as pointed out hereinabove, this is insufficient to meet the statutory requirements pertaining to discovery.

The contestees' evidence does tend to establish a certain mineralization on the Big Wonder claim of a spotty or eratic nature. But, as stated for similar facts in United States v. Riggs, 16 IBLA 385, 395 (1974):

> At most, it might warrant further exploration in an attempt to discover an ore body, but this does not suffice to establish a discovery of a valuable mineral deposit. [Citing Converse v. United States, supra; United States v. Larsen, supra.]

With regard to the mill at Notom, which could hopefully upgrade any mineralization present on the Big Wonder and any of the other claims, it is notable that the evidence of contestees on this point fails to establish the quantity of any given quality of "ore" which could be shipped to this upgrading plant. Of significance, also, is the fact that this plant was not in operation either at the time of Proclamation 3888 or as of the time of the hearing.

Thus, the prima facie case of contestant was not refuted.

Conclusion

Accordingly, following consideration of the entire record in this case, pursuant to the prayer of the complaint, the above-captioned mining claims are all declared null and void for the lack of a discovery of a valuable mineral deposit either as of the time of the January 20, 1969 Presidential Proclamation or as of the time of the hearing. This determination renders findings unnecessary with regard to other charges in the complaint.

Harvey C. Sweitzer

Administrative Law Judge

APPEAL INFORMATION

The contestees have the right of appeal from this decision to the Board of Land Appeals. The appeal must be in strict compliance with the regulations in Title 43 Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken by the contestees, the adverse party to be notified is:

Field Solicitor
U. S. Department of the Interior
450 Golden Gate Avenue, Box 36064
San Francisco, California 94102

Enclosure: Information Pertaining to Appeals Procedures

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